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JUL 22 1998
LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

GILBERT N. MICHAELS, individually and doing business as VISAGE FINE ART, Plaintiff, vs. WILDENSTEIN & CO., INC., a New York corporation; MULTI MEDIA VISUAL ART, INC., a Nevada corporation; LAWRENCE ROSS, also known as LARRY ROSS, an individual, Defendants.	Case No. BC 137 720 **COURT'S RULING RE: MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, WILDENSTEIN & CO., INC.** Hearings Held: February 18, 1998 and July 10, 1998

On February 18, 1998, this court heard arguments by counsel regarding a motion for summary judgment brought by the defendant, Wildenstein & Co., Inc. At

that time this court made the following rulings and findings.

(i) Plaintiffs rescission and unjust enrichment causes of action were barred by the two-year statute of limitations;

(ii) Plaintiff suspected or should have suspected that his injury was caused by the defendants' wrongdoing in August or September of 1992; and

(iii) The three-year statute of limitations for any and all fraud causes of action expired prior to the filing of the instant action (the case at bar was filed October 24, 1995).

A more detailed explanation of the court's prior ruling and findings is set forth in the court's minute order of February 18, 1998. The only issue remaining as of February 18, 1998 was whether or not plaintiff could successfully invoke the doctrine of equitable tolling in order to avoid the consequences of the statute of limitations. Further briefing as to this point was requested by the court and a hearing was originally set for March 27, 1998. At the request of all counsel, the hearing set for March 27, 1998 was continued to June of 1998. Due to the court's calendar, this court reset the further arguments of counsel as to the equitable tolling doctrine for July 18, 1998.

Having read and considered the points and authorities submitted by each side and having considered the oral arguments of counsel, this court now proceeds with its ruling.

In order to invoke the doctrine of equitable tolling, the plaintiff is required to establish that all three prongs have been met.

First, plaintiff must have diligently pursued his claims.

Second, the fact that plaintiff is left without a judicial forum for resolution must be attributable to forces outside the control of plaintiff.

Third, the defendant must not be prejudiced by the application of the doctrine.

The three factors mentioned above are discussed in the case of *Hull v. Central Pathology Service* (2nd Dist., 1994) 28 Cal.App.4th 1328, 1336. The essence of the dispute, now before the court, regarding equitable tolling is that the moving and responding parties disagree as to whether plaintiffs good faith must exist in the filing of the first action, the second action or both. The moving party (defendant Wildenstein & Co.) argues strenuously for the proposition that in order to qualify for equitable tolling a plaintiff must have acted reasonably and in good faith throughout the litigation, not just in the brief moment between the end of the first case and the commencement of the second. This court agrees with the moving party's premise.

Applying this premise to the case at hand, this court believes and concludes that the plaintiff cannot invoke the doctrine of equitable tolling. The plaintiff, Gilbert Michaels, originally filed an action against the defendant in the United States District Court, Central District of California in or about June of 1993. In that

action the plaintiff Michaels voluntarily chose to pursue his claims of wrongdoing through the Federal Civil Rico Statute. After issues concerning venue were ultimately resolved, plaintiff's federal action was transferred to the U.S. District Court for the Southern District of New York. After two years of pre-trial wrangling concerning the Rico claims, the plaintiff chose to voluntarily abandon those claims upon the filing of a second amended complaint. Plaintiff Michaels' decision to pursue a Rico claim in federal court for two years was clearly not a choice between alternative remedies designed to lessen the extent of his injuries. Plaintiff Michaels strategically chose a remedy to maximize the extent of damages he could recover. This point is not to be overlooked since the California Supreme Court noted in the case of *Addison v. State* (1978) 21 Cal.3d 313, 317, that the doctrine of equitable tolling is afforded a litigant who, in good faith, pursues a legal remedy designed to lessen the extent of his injuries or damages. Additionally, it should be noted that plaintiff likewise chose the federal forum since Rico relief is and was available in California state court [*see: Cianci v. Superior Court* (1985) 40 Cal.3d 903, 916].

The federal judge's comments concerning plaintiffs pursuit of the Rico claim is quite instructive in this regard:

"THE COURT: When you focused on it, you really didn't have a federal claim. It's not even that the federal claim was dismissed, you withdrew it. I don't penalize you for that. Normally, when I dismiss a federal claim and there is no independent ground of

jurisdiction, I send the case to state court where it belongs.

If this federal claim had not been asserted, from my point of view, this case would have been brought in the state court. As a matter of policy, generally speaking, this court does not encourage shaky federal claims by holding on to state litigation which came to federal court just because of the presence of a shaky federal claim.

Regardless of how it was disposed of, and this has nothing to do with motivation, it has to do with the fact that the court would like to encourage litigants to carefully consider whether they really have federal questions that belong in federal court." [Hearing before the Honorable Miriam Goldman Cedarbaum, September 22, 1995.]

In the matter before this court, it cannot be ignored that plaintiff initially chose both his method of remedy and his forum. Plaintiff likewise chose to voluntarily withdraw the very remedy that he consciously chose to pursue. Whatever predicament the plaintiff now finds himself in can only be laid at his own doorstep. This is not a case where the plaintiff was deprived of his day in court by way of forces outside of his control. Plaintiff was in the court of his choosing and after two years of pursuing the claim of his choosing, he decided to abandon it.

The fundamental purpose behind the doctrine of equitable tolling is to permit the court to intervene with equitable powers when it believes that an unjust result might occur. The points made by the defendant

moving party in its supplemental papers describe and articulate precisely why the doctrine cannot be invoked by the plaintiff Michaels. This court sets forth herein below in *haec verba* moving party's position in this regard:

"Applying equitable tolling to this case would subvert two of the very policies that support the doctrine. Equitable tolling was designed to avoid the hardship on plaintiffs of being compelled to pursue simultaneously several duplicative actions on the same set of facts. It also reduces the costs incurred by courts and other dispute resolution tribunals, at least where a disposition in the first case makes a second proceeding unnecessary, easier, or cheaper to resolve. *Collier v. City of Pasadena* (1983) Cal.App.3d 917, 926.

In this case plaintiff was never compelled to pursue his case in more than one forum. He voluntarily chose to file first in federal court, to pursue the case there for more than two years, to eliminate the basis for the federal court's jurisdiction, to file next in the California state court, and to file a third suit in the New York Supreme Court. Exs. 1, 9, 13. To this day, plaintiff continues to demand that three different courts address issues surrounding his case. Exs. 13, 14. Plaintiff's voluntary tactical decisions multiplied the number of actions and compounded rather than lessened the costs to courts of handling this dispute. Equitable tolling should not be applied to reward a plaintiff whose own strategic choices created the undesirable consequences the doctrine was designed to avoid." [See: Moving Party's Supplemental Brief, pp. 4-5, filed July 9, 1998.]

Simply put, this court believes that moving party's argument against the assertion of equitable tolling best reflects the position of this court. In light of all facts and circumstances surrounding this case, and in further light of *Hull v. Central Pathology, supra,* and the *Estate of Gianna Blue v. County of Los Angeles* (9th Cir. 1997) 120 F.3d 982, this court declines to invoke the doctrine of equitable tolling and grants moving party's motion for summary judgment. Moving party is to prepare a judgment in conformity with this court's ruling. A copy of this court's ruling is sent via U.S. mail to all parties appearing in this action. The trial date is vacated and all hearing dates are likewise vacated.

As to the notice of settlement filed on July 9, 1998 as to the defendants, Multi Media Visual Art and Lawrence Ross, this court sets an OSC for September 2, 1998 at 8:30 a.m. as to why the case should not be dismissed for failure to consummate the settlement. If the court is in receipt of a dismissal prior to September 2, 1998, the OSC will be discharged on the court's own motion.

DATED: JUL 22 1998

PETER D. LICHTMAN
PETER D. LICHTMAN
Judge of the Superior Court